No. 14-103

Supreme Court, U.S.
FILED
DEC 10 2014
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,

Petitioners,

v.

ASARCO LLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR *AMICI CURIAE* BANKRUPTCY LAW SCHOLARS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae are law professors who teach and write in the field of bankruptcy law.[1] *Amici* are not predisposed to systematically advance the parochial interests of debtors or creditors or federal or state governmental bodies.[2] They file this brief because of their academic interest in promoting the coherent interpretation of the Bankruptcy Code and the

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[1] *Amici* file this brief with the written consent of all parties. Supreme Court Rule 37. No counsel for a party authored this brief in whole or in part. No person or entity including *Amici* or their counsel made a monetary contribution for the preparation or submission of this brief; it has been prepared *pro bono publico*. Professor Kenneth N. Klee was engaged by Baker & Botts LLP to serve as an expert witness on behalf of the ASARCO LLC bankruptcy estate in connection with the substantive issues out of which this subsequent fee litigation arose. That engagement is long terminated. Neither Mr. Klee nor his firm, Klee Tuchin Bogdanoff & Stern LLP, has been involved in the dispute over the legal fees at issue in this case.

[2] Douglas G. Baird is Professor of Law at the University of Chicago Law School. Daniel J. Bussel is a Professor of Law at the University of California, Los Angeles (UCLA) School of Law. Laura B. Bartell is a Professor of Law at Wayne State University. Kenneth N. Klee is a Professor of Law Emeritus at the UCLA School of Law. Stephen Lubben is a Professor of Law at Seton Hall University School of Law. Bruce A. Markell is a Professor of Law at Florida State University College of Law and a Visiting Professor at Northwestern University School of Law. Charles W. Mooney, Jr. is a Professor of Law at the University of Pennsylvania Law School. Scott Pryor is a Professor of Law at Regent University School of Law. David Skeel is a Professor of Law at the University of Pennsylvania Law School. Messrs. Bussel, Klee, Markell and Pryor are also members of this Court's bar.

effective and efficient functioning of the bankruptcy system.

SUMMARY OF ARGUMENT

Before enactment of the Bankruptcy Reform Act of 1978, courts supervising corporate reorganizations exercised discretion to authorize the payment of fees incurred by estate professionals in successfully defending objections to their fee applications.

In the allowance of professional fees and expenses, however, they applied a "principle of economy" that had the effect of imposing below-market fees on those bankruptcy professionals whose fees were subject to court supervision, and generally precluded recovery of the expenses of routine preparation of fee applications.

This Court has often noted that established pre-Code bankruptcy practices, when not inconsistent with the express terms of the Bankruptcy Code, continue to guide the interpretation of the Bankruptcy Code. Thus, understanding this pre-Code background is imperative to properly construing the current provisions of the Bankruptcy Code relating to the compensation of estate professionals.

In 1978, Congress deliberately liberalized the allowance of fees by eliminating the "principle of economy." In rejecting this pre-Code limiting principle on fee allowance, Congress expressed no intention of

upsetting the longstanding understanding that a court supervising the allowance of fees in a reorganization proceeding retained discretion to allow fees incurred in successfully overcoming meritless objections to fee allowance.

Indeed, continuing the pre-Code practice of allowing fees for defending fee applications was consistent with Congress's overall objective in 1978 to ensure that professionals who devoted themselves to bankruptcy practice would not be limited to substandard fees as had been the case under prior law, but rather would be compensated in a manner equivalent to professionals of comparable skill, experience and ability retained by private clients in comparable non-bankruptcy representation.

Most lawyers, of course, are not in the position of having to litigate the reasonableness of their fees with anyone other than the client that engaged them, much less multiple adversaries of that client. So the issue of compensation for the defense of objections to fee allowance is not routine in most commercial practices. In contrast, any party in interest may object to any bankruptcy estate professional's proposed fees.

Fee applications and objections thereto are not unique to bankruptcy. In comparable circumstances when fees are court-approved, including federal statutes providing for fee shifting under court supervision, courts hearing objections generally allow fees for a successful defense – a practice upheld by this

Court. Such additional defensive fees are included to avoid diluting fee awards by imposing the expense of meritless fee litigation on the applicant. Congress's policy of comparability to non-bankruptcy practice, as well as the parallel long-established pre-Code practice under prior bankruptcy law, accordingly mandates allowance of defense fees in bankruptcy cases subject to the discretion of the supervising court.

ARGUMENT

I. PRE-BANKRUPTCY CODE REQUIREMENTS OF ECONOMY MANDATED LIMITED FEE AWARDS.

Before the Bankruptcy Reform Act of 1978 (as subsequently amended, the "Bankruptcy Code"),[3] reorganization law was governed in turn by case law developed in federal equity receivership proceedings, Section 77B of the Bankruptcy Act of 1898 (enacted 1934), and the Chandler Act (enacted 1938).[4]

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[3] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at title 11, United States Code).

[4] Bankruptcy Act of 1898, 30 Stat. 544 (1898) (repealed 1978); § 77B, 48 Stat. 911, 11 U.S.C. § 107 (1934) (repealed 1978); Chandler Act, Chapter X, 52 Stat. 840, 883, 11 U.S.C. § 501 (1938) (repealed 1978).

A. Equity Receiverships.

The 1898 Bankruptcy Act included provisions for "compositions," as well as liquidations, but prior to 1934, most business restructuring occurred through federal equity receiverships rather than under the 1898 Act.[5] Not only counsel for debtors and receivers, but also for multiple committees of stockholders, reorganization managers, and creditors, received compensation for their participation in the reorganization

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[5] Bankruptcy Act of 1898, § 12, 30 Stat. 544, 563 (1898) (repealed 1978); 6 JAMES WM. MOORE, ET AL., COLLIER ON BANKRUPTCY ¶ 0.03 at 21-28 (14th ed. 1978) [hereinafter COLLIER 14TH] (discussing limitations on bankruptcy compositions, including lack of provisions to address secured debt); *see* Securities and Exchange Commission, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, PART I at 869 (1937) [hereinafter 1937 SEC REPORT] ("Prior to the enactment of Section 77 and Section 77B of the Bankruptcy Act, the favored method for effecting a corporate reorganization was through the federal consent receivership."); Securities and Exchange Commission, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, PART VIII 250 at 61 (1940) [hereinafter 1940 SEC REPORT] ("Prior to the enactment of Sections 77 and 77B, there was seldom resort to the provisions of the Bankruptcy Act for the purpose of effecting the reorganization of corporations whose securities were held by the general public. When such enterprises became involved in financial difficulties serious enough to entail judicial proceedings, they were customarily reorganized through the medium of equity receivership despite the disadvantages and limitations of that procedure. . . ").

under agreed plans.[6] Little or no court supervision of these fees occurred, and litigating fee objections was not a material part of reorganization practice in the pre-1934 period.[7]

B. Section 77B Brings Reorganization Law Under the 1898 Act.

One of the purposes of amending the 1898 Act to include Section 77B in 1934 was "the desire to reduce the costs of reorganization."[8]

In Section 77B reorganizations, committees and interested parties could no longer set their own fees by private agreements or plan provisions.[9] Section 77B(c)(9) provided that the supervising court "may allow a reasonable compensation for the services

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[6] *See United States v. Chicago, M., St. P. & P.R. Co.*, 282 U.S. 311, 319-20 (1931) (describing equity receivership plan compensation provisions for multiple committees of creditors, stockholders and managers).

[7] 6 COLLIER 14TH ¶ 0.04[2.3] at 58 ("[T]he receivership mechanism afforded only a perfunctory examination on the fairness of the essential phases of the proposed plan, since the theory was that the court could not control the plan . . [and] [t]he receivership itself was costly and wasteful."); *United States v. Chicago*, 282 U.S. at 324-28 (holding that the power to regulate commerce did not authorize regulation of equity receivership plan compensation provisions).

[8] *Brown v. Gerdes*, 321 U.S. 178, 181 (1944) ("Sec. 77B, like § 77 of the Bankruptcy Act, had as one of its purposes the establishment of more effective control over reorganization fees and expenses").

[9] 6A COLLIER 14TH ¶ 13.01 at 514 (14th ed. 1977).

rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and the plan by officers, parties in interest, depositaries, reorganization managers and committees or other representatives of creditors or stockholders, and the attorneys or agents of any of the foregoing and of the debtor."[10] Courts implemented this provision by applying strict standards of "benefit to the estate" which were perceived by some to impede the functioning of the reorganization process.[11]

Multiple committees of creditors and interested parties participated in Section 77B proceedings, but their fee requests were often denied as duplicative and beneficial only to those parties, not the estate. Even when courts found their services to be beneficial to the estate, however, attorneys still received low fee allowances under the "conservation of the estate" principle.[12] This Court held that economic administration restrictions on fees and expenses in bankruptcy cases under Section 77B must be strictly enforced "even when the compensation allowed was, in special

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[10] 11 U.S.C. § 207(c)(9); *see also In re Paramount Publix Corp.*, 83 F.2d 406, 407 (2d Cir. 1936) (discussing this provision).

[11] 6A COLLIER 14TH ¶ 13.01 at 516-17; Emmett McCaffery, *Corporate Reorganization Under the Chandler Bankruptcy Act*, 26 CALIF. L. REV. 643, 657-58 (1938); Alfred B. Teton, *Reorganization Revised*, 48 YALE L.J. 573, 603-04 (1939); 1940 SEC REPORT.

[12] Teton, *supra* n.11 at 606 (1939); 6A COLLIER 14TH ¶ 13.01 at 515-16, ¶ 13.02 at 542 n.45.

circumstances, materially less than that which otherwise might have been considered reasonable."[13]

Following the enactment of Section 77B, the Securities and Exchange Commission, under the direction of future Justice William O. Douglas, undertook an extensive study of the abuses of bankruptcy reorganizations by participants in the process to the detriment of investors. The study was undertaken in conjunction with the legislative process leading to enactment of the 1938 Chandler Act.[14] With respect to professional fees, the SEC Report stated that the "vice is that the bar has been charging all that the traffic will bear. It has forsaken the tradition that its members are officers of the court and should request and expect only modest fees."[15] The SEC found that the problem with fees arose when attorneys did not

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[13] *Callaghan v. Reconstr. Fin. Corp.*, 297 U.S. 464, 468 (1936); 1940 SEC REPORT at 244 ("Consistently with the policy thus disclosed by its legislative history, and with the policy of the Bankruptcy Act, of which it was an integral part, the courts demanded that proceedings under Section 77B be economically administered, and they construed strictly the limitations upon allowances, though this resulted in occasional hardship to an individual applicant."); *Developments in the Law: Reorganization Under Section 77B of the Bankruptcy Act – 1934-1936*, 49 HARV. L. REV. 1111, 1202 (1936) ("The courts have relied both on the need for economy in the administration of the corporate assets and on the policy adopted of giving participants in the reorganization the character of court officers, entitled to receive less than would be their due were they agents of parties not involved in judicial proceedings.").

[14] *See* 1937 SEC REPORT; 1940 SEC REPORT.

[15] 1937 SEC REPORT at 215.

"promote reorganization expeditiously, economically, and solely in the interests of investors,"[16] but also found that "compensation was not always excessive" and "[t]he importance of the role of lawyers in reorganizations is difficult to overemphasize."[17]

The SEC further advised that the principle of economy had severe drawbacks that "were likely in some measure to react to the detriment of investors, especially as reorganization proceedings under Section 77B tended to become the exclusive bailiwick of those accustomed in the past to dominate equity reorganizations."[18] The SEC therefore recommended

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[16] 1937 SEC REPORT at 211-12.

[17] *Id.* at 213; *see id.* ("They advise receivers and trustees with respect to virtually every step taken which does not concern the detailed operation of the particular business. They aid in the formulation of the policies of committees, draft the deposit agreement and reorganization plan, and defend them against attack. . . . The determination of the relative rights of security holders may require negotiation or litigation by attorneys. . . . Attorneys must be employed for these tasks and *are entitled to fair and reasonable compensation.*" (emphasis added)).

[18] 1940 SEC REPORT at 252. For example, objecting minorities, "however honest[ ] and abl[e]," were not compensated; "attorneys were deemed not connected with 'benefit to the estate' if they were concerned entirely with seeking more favorable terms in the plan of reorganization for those whom they represented"; although Section 77B(c) "afforded all creditors and stockholders the right to be heard on the proposed confirmation of a plan," compensation to their counsel "was almost uniformly denied," even for "interveners with substantial holdings who forced material changes in the plan adopted"; and, once a committee was in the field, usually dominated by the debtor, any

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that, unlike the practice under Section 77B, "[r]easonable compensation for services rendered and reimbursement for proper costs and expenses incurred by parties in interest and their attorneys in connection with the administration of the estate or with a plan of reorganization should be allowed by the court."[19]

C. The Chandler Act Replaces Section 77B.

The Chandler Act enacted Chapter X as the successor to Section 77B. Legislating on the basis of the SEC Report, the principal solutions in the Chandler Act to perceived problems under prior reorganization law were appointing disinterested trustees to displace management in large cases, restricting the role of multiple committees of creditors, and utilizing advisory assistance of the SEC, including with respect to SEC recommendations on professional fees.[20]

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subsequent committee seeking compensation was required to show "the need for separate representation, *i.e.*, that the existing committee was not honest or efficient or was otherwise disqualified." *Id.* at 249-52.

[19] 1937 SEC REPORT at 902.

[20] Teton, *supra* n.11 at 573; *see also* 6A COLLIER 14TH ¶ 13.02 at 528-29. The Borah Act in 1937 also made bankruptcy and receivership fee sharing a crime, which was extended in 1949 to include attorneys for parties in such cases. 18 U.S.C. § 155. *See* 1 HENRY J. SOMMER AND ALAN N. RESNICK, COLLIER ON BANKRUPTCY ¶ 7.05 at 7-107 – 7-111 (16th ed. 2014) [hereinafter COLLIER 16TH].

The Chandler Act included a detailed and comprehensive scheme for the supervision and allowance of reorganization fees and expenses.[21] Fee authorization was expanded and "democratized" to encourage participation by individuals and independent committees, but judicial control was strengthened.[22]

The principle of economy remained in effect under the Chandler Act, however. In *Massachusetts Mutual Life Insurance Co. v. Brock*, for example, the court remanded fee awards because the trial court failed to consider "the public interest which is inherent in bankruptcy matters," even though it had properly considered the time spent on the case by the trustee and his counsel, the complexity of the issues, and the commendable results achieved.[23]

D. Bankruptcy Rules.

This Court promulgated General Orders from time to time which governed procedures in bankruptcy

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[21] 6A COLLIER 14TH ¶ 13.01 at 519; *see also* Chandler Act, § 241, 52 Stat. 840, 900 (1938) (trustee, court officers, attorneys for debtors and petitioning creditors); *id.* § 242 (indenture trustees, committees, representatives of creditors or stockholders, other interested parties except the SEC, and attorneys for all); *id.* § 243 (creditors, stockholders and their attorneys in connection with plans); *id.* § 247, 52 Stat. 840, 901 (fee applications to be heard by the court upon notice); *id.* § 250, 52 Stat. 840, 901-02 (appeals of fee awards).

[22] 6A COLLIER 14TH ¶ 13.01 at 519-21.

[23] 405 F.2d 429, 432 (5th Cir. 1968).

courts.[24] Following passage of the Rules Enabling Act, the Court promulgated Federal Rules of Bankruptcy Procedures in 1973.[25]

Former Bankruptcy Rule 219 provided that compensation was allowable by the court "for services rendered in the administration of a bankrupt estate shall be reasonable, and in making allowances the court shall give due consideration to the nature, extent, and value of the services rendered as well as to the *conservation of the estate* and the interests of creditors."[26] As a result, although allowances from the estate were within the "sound judicial discretion of the court,"[27] "economy [was] strictly enjoined, by the well-known policy of the bankruptcy act "[28]

In Chapter X cases, fees were approved under procedures and guidelines set forth in former Rule 10-215.[29] Although not explicitly required by that

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[24] *E.g.*, 267 U.S. 613, 614 (1925) (XLII required that every attorney seeking an allowance of compensation from a bankrupt estate file a petition under oath with the referee, setting forth a full and detailed statement of services, amount claimed, and any partial allowance, accompanied by an affidavit regarding no agreement for sharing of fees).

[25] *See* 28 U.S.C. § 2075 (1970); 411 U.S. 991 (1973).

[26] FED. R. BANKR. P. 219(c)(1) (repealed) (emphasis added) in 411 U.S. at 1036.

[27] *In re Carolina Cooperage Co.*, 96 F. 950, 954 (E.D.N.C. 1899).

[28] *In re Oppenheimer*, 146 F. 140, 141 (M.D. Pa. 1906).

[29] *Id.*; FED. R. BANKR. P. 10-215 (repealed) in 421 U.S. 1019, 1050-53 (1975) (providing for "reasonable compensation for

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rule, the "principle of economy" still governed, and led courts to impose below-market fees on bankruptcy professionals.[30]

Courts interpreting Rule 10-215 looked to the value of the debtor's estate, the amount available for allowances, and the ability of the reorganized debtor to pay, in determining fee reasonableness.[31] Courts held that those rendering professional services could not expect to be compensated on a scale equal to that obtainable in private employment.[32] In some cases, courts would benchmark bankruptcy lawyers' fees against prevailing judicial salaries which then (as now) lagged market rates for attorney services in sophisticated commercial matters.[33]

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necessary services and reimbursement of necessary expenses incurred in a Chapter X case").

[30] 6A COLLIER 14TH ¶ 13.02 at 537; *Greensfelder v. St. Louis Pub. Serv. Co.*, 114 F.2d 53, 61 (8th Cir. 1940); *Milbank, Tweed & Hope v. McCue*, 111 F.2d 100, 101 (4th Cir. 1940).

[31] 6A COLLIER 14TH ¶ 13.02 at 538-39; *In re W. Counties Constr Co.*, 182 F.2d 409 (7th Cir. 1950); *Finn v. Childs Co.*, 181 F.2d 431, 435-36 (2d Cir. 1950).

[32] 6A COLLIER 14TH ¶ 13.02 at 539-40 n.37; *In re Mt. Forest Fur Farms of Am.*, 157 F.2d 640, 647 (6th Cir. 1946); *Stark v. Woods Bros. Corp.*, 109 F.2d 969 (8th Cir. 1940); *In re Standard Gas & Elec. Co.*, 106 F.2d 215, 216-17 (3d Cir. 1939).

[33] *See, e.g., Official Creditors' Comm. of Fox Markets, Inc. v. Ely*, 337 F.2d 461, 466 (9th Cir. 1964); *York Int'l Bldg., Inc. v. Chaney (In re York Int'l Bldg., Inc.)*, 527 F.2d 1061, 1073 (9th Cir. 1975).

Congress's 1978 comprehensive overhaul of bankruptcy law paid particular attention to reforming the pre-Code system of professional compensation. 11 U.S.C. Section 330 deliberately excised Rule 219's reference to "conservation of the estate and the interests of creditors" and substituted, as a required factor, "the cost of comparable services" in non-bankruptcy matters. The guiding principle of the 1978 reform was to encourage talented professionals to specialize in bankruptcy practice instead of retreating to seek more favorable fees in other areas of commercial law.

II. UNDER THE FORMER BANKRUPTCY ACT, COURTS HAD DISCRETION TO CONSIDER AND AWARD DEFENSE FEES IN APPROPRIATE CIRCUMSTANCES.

Under pre-Code law, subject to the principle of economy, district courts had "sound discretion" to determine "the proper amounts to be awarded to fee claimants in reorganization proceedings."[34] This was an equitable determination, with two components of direct import to this case:

(1) Professional fees incurred in *preparing* fee applications were subject to disallowance under the economy principle, which required "a balancing of the competing equities of the persons affected which in

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[34] *In re Solar Mfg. Corp.*, 206 F.2d 780, 781 (3d Cir. 1953); *see also In re Mullendore*, 527 F.2d 1031, 1038 (10th Cir. 1975).

the interests of fairness [courts] must make appropriate practical distinctions in distributing the costs of the burden of the litigation, [which] has been recognized as a salutary rule which helps preserve the assets of the estate."[35]

(2) Professional fees incurred in *defending* against a third party's objection to a fee award were granted, however, when the court – with input from the SEC – deemed the circumstances to be appropriate. *See In re Ark. Fuel Oil Corp., Cities Serv. Co.*, 234 F. Supp. 31, 39-40 (D. Del. 1964) (exercising discretion to deny fee litigation fees, but noting "policy of the Commission to allow supplemental fees wherever applicants have prevailed in the reviewing court").

As explained clearly in *In re United Corp.*, the pre-Code rationale behind denying fees for preparing fee applications "does not in our opinion apply to services and expenses in connection with the successful defense, on appeal by others, of an award made to the applicant by the fee tribunals. In such case we think equitable considerations justify the awarding of compensation for the services required to defend the initial allowance, and to the extent applicant's

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[35] *In re United Corp.*, File No. 54-184-1, 39 S.E.C. 391, 396, 0059 WL 59228, at *5 (Sept. 30, 1954) (internal quotation marks and alterations omitted) (and citing, *e.g.*, *Standard Gas & Elec. Co. v. S.E.C.*, 212 F.2d 407, 413 (8th Cir. 1954) (fees allowance expenditures generally denied, but portion allowed as incurred at SEC's request)).

request relates to services of that nature it is entitled to favorable consideration."[36]

The SEC served an important advisory role in Chapter X cases.[37] Because of the SEC's statutory role in Chapter X cases in reviewing attorneys' fee applications and recommending appropriate allowances, and given its stature as a disinterested agency experienced in reorganization affairs, courts granted considerable weight to the SEC's views on fees.[38]

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[36] 39 S.E.C. at 396-97, 0059 WL 59228, at *5.

[37] *See, e.g., Surface Transit, Inc. v. Saxe, Bacon & O'Shea*, 266 F.2d 862 (2d Cir. 1959) ("[T]he recommendations of the Securities and Exchange Commission, representative of the public interest, are entitled to great weight."). *See Sec. & Exchange Comm'n v. Cogan*, 201 F.2d 78 & n.5 (9th Cir. 1951) (quoting 15 U.S.C. § 79k(f)); SEC Rules and Regulations under the Public Utility Holding Company Act of 1935 (1938), Rule U-11F-2, *quoted in* S.E.C. Release No. 35-1939 at *4 n.1, 1939 WL 37605 (Feb. 23, 1940).

[38] 6A COLLIER 14TH ¶ 13.02 at 529-30; *Scribner & Miller v. Conway*, 238 F.2d 905 (2d Cir. 1956) (SEC recommendations should be followed unless court shows reasons otherwise based on specific findings); *In re Detroit Int'l Bridge Co.*, 111 F.2d 235, 238 (6th Cir. 1940) (SEC recommendations entitled to weight, but not conclusive).

III. CONGRESS ENACTED SECTION 330(A) TO ENSURE BANKRUPTCY PROFESSIONALS WOULD BE COMPENSATED AT MARKET RATES, INCLUDING FOR PREPARATION OF FEE APPLICATIONS, WITHOUT CHANGING THE LAW ON "FEE DEFENSE" FEES.

Pre-Code bankruptcy practice guides interpretation of the Bankruptcy Code, except to the extent that practice is inconsistent with new statutory language.[39] "We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."[40]

In Section 330, Congress set forth five factors for courts to use in fixing "reasonable compensation for actual, necessary services" performed by bankruptcy professionals: "the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title."[41]

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[39] *See, e.g.*, *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific . . . . The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.") (citations omitted).

[40] *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998), quoting *Pennsylvania Pub. Welfare Dep't. v. Davenport*, 495 U.S. 552, 563-64 (1990).

[41] 11 U.S.C. § 330 (1978), *as reprinted in* COLLIER 16TH, B Appx. pt. 4(a) at 4-22 (currently expanded as set forth below).

Neither Section 330 nor any other part of the Bankruptcy Code rejects or alters pre-Code law allowing professional fees incurred in the defense of fee application objections in appropriate circumstances. Final fee rulings on such objections are plainly "necessary services" as the allowance of fees must be made before all bankruptcy estate assets can be distributed to administrative and prepetition claimants and the case can be closed.[42]

Likewise, preparation of fee applications that are required before fees can be awarded are plainly "necessary services" – without that work, bankruptcy courts cannot determine whether compensability criteria in Bankruptcy Code Sections 330 and 331 and Federal Rule of Bankruptcy Procedure 2014 have been met. Inclusion of such fees as a type of necessary work, payable upon termination of the principle of economy, was clarified by the 1994 enactment of Section 330(a)(6), setting forth compensability standards for that routine, although time-consuming, task.[43] The legislative history of that provision shows Congress's concern that professionals were charging "hefty fees just for preparing their bills."[44]

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[42] *See* 11 U.S.C. § 350 (requiring case to be fully administered before it is closed); § 1123(a)(9)(A) (administrative expenses, including allowed fees, must be fully paid or provided for in order to confirm a reorganization plan).

[43] 11 U.S.C. § 330(a)(6).

[44] *Professional Fees in Bankruptcy: Hearing on Certain Problems Associated with Evaluating and Monitoring the Fees*

(Continued on following page)

Compensability of fee application services and the award of fees in appropriate cases for defending fee challenges are informed by Congress's expressed intention that supervising courts consider the cost of comparable services in non-bankruptcy cases in allowing compensation. The requirement to consider fees paid to other, non-bankruptcy professionals was added to implement the "policy of this Section to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11."[45] Fee defense is not a routine task. It can, as in this case, involve complex, hotly contested adversary litigation.

Charged by Professionals Against Estates in Bankruptcy Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary, 102d Cong. 4 (1992) (statement of the Hon. Howard M. Metzenbaum, United States Senator); *id.* at 65-67 (statement of Marcy J.K. Tiffany, U.S. Trustee, Region 16) (explaining that fee application fees are permitted under case law, and that unlike non-bankruptcy cases, court appearances are required for fee approval in bankruptcy, but amounts billed may be excessive); *id.* at 122 (statement of Keith Shapiro, partner at law firm of Holleb & Coff) ("While the majority of surveyed courts allow full compensation for time spent complying with applicable fee statutes and rules, a significant number of courts do not . . . [which] is yet another example of a lack of uniformity in the application of the Code's fee provisions which could be rectified by a simple amendment."); *id.* at 157-58 (Keith Shapiro's explanation that fee applications are more complex than preparation of invoices).

[45] 124 CONG. REC. H11,091-92 (daily ed. Sept. 28, 1978); 124 CONG. REC. S17,408 (daily ed. Oct. 6, 1978).

Indeed, the legislative history shows that the House of Representatives, whose version of this Code provision was ultimately enacted, intended by that language "to overrule *Matter of Beverly Crest Convalescent Hospital, Inc.*, 548 F.2d 817 (9th Cir. 1976), which set an arbitrary limit on fees payable, based on the amount of a district judge's salary, and other, similar cases that require fees to be determined based on notions of conservation of the estate and economy of administration."[46] The House explained that "[i]f that case were allowed to stand, attorneys that could earn much higher incomes in other fields would leave the bankruptcy arena."[47] In enacting the final version of the Bankruptcy Reform Act of 1978, the House also expressly overruled *Massachusetts Mutual Life Insurance Co. v. Brock*,[48] reiterating that "[n]otions of economy of the estate in fixing fees are outdated and have no place in a bankruptcy code," and stated that "bankruptcy legal services are entitled to command the same competency of counsel as other cases."[49]

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[46] H.R. REP. NO. 595, at 329-30 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6286.

[47] *Id.*; *see also id.* (without fee parity, "[b]ankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service").

[48] 405 F.2d 429, 432 (5th Cir. 1968).

[49] 124 CONG. REC. H11,091-92 (daily ed. Sept. 28, 1978).

The current version of Section 330 is even more explicit. It provides that when "determining the amount of reasonable compensation to be awarded , the court shall consider all relevant factors, including (F) *whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.*"[50]

IV. FEE DEFENSE FEES ARE AWARDED IN COMPARABLE NON-BANKRUPTCY CONTEXTS.

Congress has provided for fee awards in numerous federal statutes. When fee awards are contested in litigation under those statutes, courts have addressed fees incurred in defending those fee awards on multiple occasions. Those cases set the standard of fees for comparable non-bankruptcy professional services as required by Section 330(a)(3)(F).

As explained in *In re Nucorp Energy, Inc.*, "[a]ttorneys' fees in bankruptcy cases are in the most important respect similar to attorneys' fees in other statutory cases. As in the case of other statutory fees, fees are awarded to bankruptcy counsel pursuant to

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[50] 11 U.S.C. § 330(a)(3)(F); Bankruptcy Reform Act of 1994, § 224(b), Pub. L. No. 103-394 (Oct. 22, 1994) (emphasis added); *see* Stephen J. Lubben, *What We "Know" About Chapter 11 Cost Is Wrong*, 17 FORDHAM J. OF CORP. & FINANCIAL LAW 141 (2012) (analysis of the context of chapter 11 reorganization professional fees and actual cost of reorganization in absolute terms).

Congress' express directive that attorneys are to receive reasonable compensation for all services rendered in the course of their representation."[51]

This Court held in *Commissioner, I.N.S. v. Jean* that courts may award fees under the Equal Access to Justice Act for fees incurred in litigating a fee request without additionally proving a fee request objection was not substantially justified.[52] The reasoning is apt:

> Any given civil action can have numerous phases. While the parties' postures on individual matters may be more or less justified, the EAJA – like other fee-shifting statutes – favors treating a case as an inclusive whole, rather than as atomized line-items. *See, e.g., Sullivan* v. *Hudson*, 490 U.S. 877, 888 (1989) (where administrative proceedings are "necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded"). *Cf. Gagne* v. *Maher*, 594 F.2d 336, 344 (CA2 1979) ("[D]enying attorneys' fees for time spent in obtaining them would 'dilute the value of a fees award by forcing attorneys into extensive uncompensated litigation in order to gain any fees'" under 42 U.S.C. § 1988), *aff'd on other grounds*, 448 U.S. 122 (1980); *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559

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[51] 764 F.2d 655, 662 (9th Cir. 1985).

[52] 496 U.S. 154, 165-66 (1990).

(1986) (fees for postjudgment proceedings to enforce consent decree properly compensable as a cost litigation under § 304(d) of the Clean Air Act); *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980) (fees for administrative proceedings included under § 706(k) of Title VII of the Civil Rights Act of 1964).[53]

Fee defense fees are routinely awarded in cases arising under the Civil Rights Attorney's Fees Awards Act (including an affirmance by this Court),[54] the Fair Housing Act,[55] Title VII,[56] labor

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[53] 496 U.S. at 161-62.

[54] 42 U.S.C. § 1988; *see, e.g.*, *Hutto v. Finney*, 437 U.S. 678, 693, 700 (1978) (appellate fee award for defending challenge to fee award against state agency); *Johnson v. Mississippi*, 606 F.2d 635, 637-38 (5th Cir. 1979); *Bagby v. Beal*, 606 F.2d 411, 415-16 (3d Cir. 1979); *Gagne v. Maher*, 594 F.2d 336, 344 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980); *see also Porzig v. Dresdner, Kleinwort, Benson, N. Am., LLC*, 497 F.3d 133, 143-44 (2d Cir. 2007) (also Age Discrimination in Employment Act, 29 U.S.C. § 626).

[55] *E.g.*, *Hairston v. R & R Apartments*, 510 F.2d 1090 (7th Cir. 1975) (remanding for fee defense fees under 42 U.S.C. § 3612(p) (formerly cited as 42 U.S.C. § 3612(c))).

[56] *Prandini v. Nat'l Tea Co.*, 585 F.2d 47, 53-54 (3d Cir. 1978) (collecting cases holding that fees for time spent on fee applications "and successful fee appeals" may be awarded). Title VII jurisprudence is especially persuasive because bankruptcy courts regularly apply the reasonableness factors for a fee award set forth in a Title VII case, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974); *see, e.g.*, *In re Pilgrim's Pride Corp.*, 690 F.3d 650, 656 (5th Cir. 2012) ("Following the Bankruptcy Code's enactment, we made clear that the lodestar, *Johnson* factors, and § 330 coalesced to form the

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statutes,[57] and many other federal statutes.[58] *See also Nucorp*, 764 F.2d at 660 (discussing cases).

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framework that regulates the compensation of professionals employed by the bankruptcy estate.").

[57] *E.g., Fegley v. Higgins*, 19 F.3d 1126, 1135 (6th Cir. 1994) (Fair Labor Standards Act case, 29 U.S.C. § 216(b), noting on remand that it would "leave it to the discretion of the district court as to whether to increase the previous award of .. attorney fees" in light of the fact that the plaintiff's attorney "expended additional effort upon this appeal"); *Pawlak v. Greenawalt*, 713 F.2d 972, 981-84 (3d Cir. 1983) (Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531, approving fees incurred in fee litigation from union treasury for enforcing statutory rights and thereby conferring common benefit).

[58] *Davis v. Bd. of Sch. Comm'rs*, 526 F.2d 865, 868 (5th Cir. 1976) (Emergency School Aid Act of 1972, § 718, 20 U.S.C. § 1617 (*repealed by* Pub. L. No. 95-561, Title VI, § 601(b)(2), 92 Stat. 2268 (1978)); *Torres v. Sachs*, 69 F.R.D. 343, 348 n.5 (S.D.N.Y. 1975) (Voting Rights Act, 52 U.S.C. § 10310 (formerly cited as 42 U.S.C. § 1973(e))); *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir. 2008) (Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(3)); *Ziegler Coal Co. v. Dir., Office of Workers' Comp. Programs*, 326 F.3d 894, 903 (7th Cir. 2003) (Longshore and Harbor Workers' Compensation Act, § 928, 33 U.S.C. § 928); *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 620-21 (6th Cir. 2007) (False Claims Act, 31 U.S.C. § 3730); *Pub. Interest Research Group of N.J., Inc. v. Windall*, 51 F.3d 1179, 1190 (3d Cir. 1995) (Clean Water Act, 33 U.S.C. § 1365(d)); *Auto Alliance Int'l, Inc. v. U.S. Customs Serv.*, 155 Fed. App'x 226, 229 (6th Cir. 2005) (Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E)(i)); *Saldivar v. Rodela*, 894 F. Supp. 2d 916, 939 (W.D. Tex. 2012) (International Child Abduction Remedies Act, 22 U.S.C. § 9007(b)(3) (formerly cited as 42 U.S.C. § 11607(b)(3))); *Bd. of Trs. of Hotel & Rest. Emps. Local 25 v. JPR, Inc.*, 136 F.3d 794, 808 (D.C. Cir. 1998) (Employee Retirement Income Security Act, 29 U.S.C. § 1132(g)(2)(D)).

The rationale for awarding fees for fee defenses in these non-bankruptcy settings is consistent with Congress's intention that fee awards in bankruptcy cases be at full market rates in order to attract competent specialist professionals into the bankruptcy field. Failing to award fees for fee defense requires the applicant to bear the cost of defending its awards from meritless objections without any further compensation. "If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased. Recognizing this fact, attorneys may become wary about taking Title VII cases, civil rights cases, or other cases for which attorneys' fees are statutorily authorized."[59]

For bankruptcy fee allowances to be truly comparable to the compensation earned by lawyers billing their private clients at fair market rates in other commercial matters, fee applicants must be compensated, not only for the incremental cost of preparing elaborate fee applications not required in non-bankruptcy matters, but also for the successful defense of the awards in respect of such applications. In other commercial settings, third parties have no opportunity to object to the fees earned by the lawyer under the lawyer's retention agreement. The court must compensate the bankruptcy estate professional

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[59] *Prandini*, 585 F.2d at 53; *see Nucorp*, 764 F.2d at 661.

for defending a fee award to ensure truly comparable fees.

Congress's intention to allow full market compensation for bankruptcy professionals, rather than maintain the dysfunctional principle of economy that imposed below-market compensation, is fully accomplished only when the supervising court can consider the facts and determine in its discretion whether a fee award for all the work in the case – including defending a fee application – is reasonable and necessary. Indeed the case for allowance of full compensation for successful fee defense is at its most compelling when, as here, creditors were paid in full under a hard-fought but highly successful confirmed plan, yet a disgruntled shareholder proffered numerous meritless objections to the allowance of the professional fees that achieved that remarkably successful result.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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